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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1159

DUN & BRADSTREET, INC.,

Petitioner,

v.

DAVID POPE HOOD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Dun & Bradstreet, Inc., hereby petitions the Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and shows in respect thereto:

I.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals with respect to which this petition is filed appears at 486 F.2d 25 (5th Cir. 1973). The decision and judgment of the United States District Court appears at 335 F.Supp. 170 (N.D. Ga. 1971). Copies thereof are appended to this petition in the Appendix at pages A-1—A-26.

II.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit, in a 2-1 split decision, was entered on September 14, 1973. The Fifth Circuit entered an order denying a petition for rehearing and for rehearing en banc, again in a 2-1 split decision, on October 31, 1973.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254, which gives to the Supreme Court of the United States jurisdiction to review the decision and judgment in question by writ of certiorari.

III.

QUESTIONS PRESENTED

This is an action for libel in which the Fifth Circuit, reversing the decision of the district judge sitting in Georgia and applying Georgia law, has held that a conditional privilege established by statute in Georgia applicable to libelous statements made without malice and not in an excessive manner in the performance of a private duty, legal or moral, is not applicable to such a statement inadvertently made by a business information reporting agency to its subscribers pursuant to contracts with them. To reach this result, the Fifth Circuit, in effect, ruled that there is no contractual duty being fulfilled in furnishing a report if there is a libelous error in a report, since it is "immoral" to make such errors in reports. Therefore, according to the Fifth Circuit, the underlying contract is also somehow caused to be immoral, and since immoral contracts are void, there is no contractual duty being fulfilled in the furnishing of the report, and, therefore, no statutory privi-

lege arising from the performance of a duty is available to the reporting agency.[1] We respectfully submit this is a non sequitur and unsound.

The questions presented are:

1. Whether a publication of business information to a subscriber of a commercial reporting agency, if inadvertently erroneous, is for that reason *immoral*, and therefore not in the performance of a private duty.

2. Whether the denial of the application of the Georgia statute providing a conditional privilege for statements made in the performance of a private duty to the statement in issue, is a denial of equal protection of the laws to commercial reporting agencies in that *all* persons in the State of Georgia *other than* commercial reporting agencies may rely upon the statutory conditional privilege for publications made in the performance of a private duty.

3. Whether the effect of the Georgia statute as so applied is to deny to the class of commercial reporting agencies equal protection of the laws, because *only* that class of persons is denied the statutory conditional privilege for statements made in the performance of a private duty, at the very time such privilege was intended to be applicable; i.e., where a statement is made without malice, with no improper motive, and not in an excessive manner, which inadvertently and innocently contains an error which is promptly corrected.

4. Whether the Georgia statutes, as so applied, arbitrarily and unreasonably

(a) impair the freedom and right of petitioner to enter into valid contracts to publish business information; and

[1] See footnote 3 at page 8, infra, for the statement in issue.

(b) limit the right of petitioner to pursue a lawful occupation, therefore denying to petitioner due process of law;

in that the decision of the Fifth Circuit has the effect of voiding the contracts of Dun & Bradstreet with its subscribers, based upon the view of the Fifth Circuit as to what the law of Georgia should be, for what it perceived as "controlling reasons" of "empirical analysis" and "contemporary notions of consumer protection" not found in the record, and contrary to the great majority of jurisdictions.

5. Whether the Fifth Circuit was correct in expanding the "commercial speech" doctrine to include publication of information pursuant to subscription *unless* the publication expresses "social concerns and grievances."

6. Whether the standard of review applied by the Fifth Circuit in a diversity case to the decision of the district court, in reversing the district judge's determination of the law of the state in which he sat, is in conflict with the "upheld, unless clearly erroneous" standard of review applied by other circuits.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes which are involved in this case are Georgia Code Section 105-709 (formerly, Section 2980 of the Code of Georgia of 1882); and Georgia Code Section 20-501 (formerly, Section 2749 of the Code of Georgia of 1882).

Georgia Code Section 105-709 provides as follows:

"Privileged communications. The following are deemed privileged communications:

1. Statements made bona fide in the performance of a public duty.
2. Similar statements in the performance of a private duty; either legal or moral.
3. Statements made with the bona fide intent, on the part of the speaker, to protect his own interest in a matter where it is concerned."

Georgia Code Section 20-501 provides as follows:

"Contracts to do immoral or illegal thing. A contract to do an immoral or illegal thing is void. If the contract be severable, that which is legal will not be annulled by that which is illegal."

The Constitutional provisions involved in this case are the First and Fourteenth Amendments to the Constitution of the United States of America.

The First Amendment provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment provides as follows:

"All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V.

STATEMENT OF THE CASE

The United States District Court for the Northern District of Georgia had jurisdiction of the complaint herein for reason that there is complete diversity of citizenship between the plaintiff, David Pope Hood, and the defendant, Dun & Bradstreet, Inc., and the amount in controversy exceeds $10,000.00. 28 U.S.C. §1332.

This petition seeks review of a 2-1 split decision by the United States Court of Appeals in *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973) (A-26), which reversed a decision of the district judge sitting in Georgia and applying Georgia law, 335 F. Supp. 170 (N. D. Ga. 1971) (A-1). The Fifth Circuit held that statements made by Dun & Bradstreet in a business information report to subscribers with whom it had contracts were not entitled to the statutory conditional privilege of the State of Georgia for publications made pursuant to private duty, following an 1886 Georgia case, which the district judge found would not be followed by a contemporary Georgia court.

In the Georgia court's words in the ancient Georgia case:

> "If morality be kin to religion, it is immoral to speak evil, much more to write evil of a fellow man to blacken his character and to injure his business, if the allegation be false. Much more is it immoral to do so for the root of all evil, the love of money. To slander from hatred or vengeance for wrong is bad enough; to do so by contract for money is infinitely worse. Therefore, this duty by contract is immoral.
>
> Is it a private legal duty? It cannot be. 'A con-

> tract to do an immoral or illegal thing is void' by the statute in this state. Code, §2749. If, therefore, it be immoral to spy and pry into the habits and business of another, and to make false statements about his character and business respectability, it is also illegal by our statute law." *Johnson v. The Bradstreet Co.*, 77 Ga. 172, 175 (1886).[2]

Following the result of this 1886 Georgia case, the Fifth Circuit ruled, in effect, that any contract between a reporting agency and its subscriber, if later any error is made in a report pursuant to the contract, becomes in some way immoral and void so that there is no contractual duty being fulfilled by the providing of the report and therefore, no statutory privilege arising from the performance of a legal duty is available to the reporting agency.

It further ruled that such a publication, pursuant to subscription, coincided with the "commercial speech" doctrine, since the information it contained did not express "social concerns and grievances".

The petitioner, Dun & Bradstreet, Inc., is a mercantile agency which, among other things, prepares and provides for its subscribers business information reports regarding persons in business, or business organizations, for use by its subscribers in making credit, marketing, or other business decisions. On October 11, 1968, Dun & Bradstreet prepared a business information report on David P. Hood, a building contractor whose prin-

[2] The facts in the old Georgia case appear to be that the defendant, The Bradstreet Company, reported to its subscribers respecting the business standing of a merchant and in good faith erred in reporting that the plaintiff was a drunkard and failing in business. The trial court charged, in effect, that the publication was within the statutory privilege. The Supreme Court of Georgia reversed in the words set out in the text. The entire text of the old Georgia case appears at A-46.

cipal business was construction of gasoline stations in and around Atlanta, Georgia. Included in this credit report was a statement that two law suits had been filed against David Hood in 1968.[3] In fact, however, the two law suits had been filed against another individual named David Hood who, like plaintiff, lived in Hapeville, Georgia, a city of approximately 10,000 population. The mistake was an inadvertent one, and Dun & Bradstreet, Inc. harbored no ill will, malice or bad faith toward plaintiff.

Subsequent to the October report, Dun & Bradstreet (on November 7, 1968) published a "Special Notice" with the word "Correction" printed three times in bold capital letters evenly spaced across the face of the notice. This notice was taken by a representative of Dun & Bradstreet to plaintiff's attorney to read and approve, prior to its publication to Dun & Bradstreet's subscribers. The correction notice referred to the two suits reported as follows:

[3] There were four items of information in the report which were alleged by the petitioner to be libelous. These were:

"(1) In interview of October 10, 1968 Mrs. Hood referred all details to her husband who had been inavailable (sic) for comment to date.

"(2) As a matter of interest, David P. Hood has always declined financial information other than to say that sales are in excess of $100,000 and that net worth is in excess of $3,000. These two estimates were submitted in July 1967.

"(3) Public records reveal suit #248479 filed June 10, 1968, for $103, Whittock Dobbs, Inc. v. subject. Also suit #238558 filed Apr. 3, 1968, Westron Corp. v. subject.

"(4) Although complete details are not available, working capital appears limited at times with some trade, slowness noted."

The trial court found that items 1 and 2 were, as a matter of law, not libelous; and that items 3 and 4 were ambiguous and might be libelous by innuendo, but were not libelous per se. The trial court found no abuse of the privilege. 335 F.Supp at 172, 176, 180 (A-2, 8, 18).

"The facts are that both suits were entered against another David Hood in Hapeville, Georgia, who was doing business as Chicken King Restaurant at 955 Virginia Ave.

There are no suits or judgments against the subject, David P. Hood."

In addition to the correction notice, Dun & Bradstreet, on November 15, 1968, issued a revised Business Information Report concerning the plaintiff which clearly stated that it was a substitute for all previous reports about plaintiff.

Despite these corrective efforts, on October 7, 1969, the complaint herein was filed. Both parties filed motions for summary judgment, and the district court granted the motion of petitioner, holding that the report in question was entitled to a conditional privilege under Georgia statute law, and that there was no malice, improper motive, or excessive publication that would defeat the privilege.

The Fifth Circuit reversed, in a 2-1 split decision.

The petitioner requests that this Court review this decision which petitioner submits applies the Georgia statute in a manner which denies to Dun & Bradstreet equal protection of the laws and due process of law as shown hereinbelow, and irrationally and illogically declares a valid legal contract for the reporting of business information to become immoral and void upon the subsequent publication of a statement which contained an inadvertent error, immediately corrected; and in so doing deprives Dun & Bradstreet, and all other com-

mercial reporting agencies, of the conditional privilege established by the Georgia statute.[4]

VI.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

The Fifth Circuit decided, contrary to the finding of the district judge sitting in Georgia that there was no conditional privilege afforded to business information reporting agencies under Georgia law. In reaching this result, the Fifth Circuit 1) agreed with the result of the 1886 decision of the Georgia Supreme Court, discussed *supra*, a decision which the district judge in Georgia found would not be followed if the question were presented to a contemporary Georgia court; 2) found that the district court's reasoning was not totally without merit, and thus not clearly erroneous, yet refused to uphold the permissible conclusion reached by the district judge sitting in Georgia applying Georgia law; 3) relied on "empirical analysis" and "contemporary notions of consumer protection" outside the record to support its view of what the law of Georgia should be; and 4) expanded the "commercial speech" doctrine by finding that the publication of a business report to subscribers, coincides with the commercial speech doctrine because the business report did not express "social concerns and grievances".

The majority opinion of the Fifth Circuit, and the 1886 Georgia case, which the district court stated rested

[4] As recognized by the Fifth Circuit, this ruling is contrary to the great majority of jurisdictions, some with and some without statutes. The Fifth Circuit stated in its opinion: "Initially, we point out that the great majority of jurisdictions . . . confronting this issue, has held that the credit reporting agency is entitled to a conditional privilege. (footnote omitted)." 486 F.2d at 30 (A-34).

"more on emotions and antiquated notions of morals than on principles of law", 335 F. Supp. at 179, missed the point that the basic contract, pursuant to which the report was made, was *not* a contract to make false reports, but was instead a contract to make accurate reports, and that Dun & Bradstreet had merely made an inadvertent error in carrying out its contract to make accurate reports.

The Fifth Circuit held, in effect, that because an inadvertent error was made in the report, the original contract was, in some way, caused to be void, so that in making the report no contractual duty was being fulfilled, and, therefore, no statutory privilege arising from the doing of a legal duty was available to Dun & Bradstreet.

Thus, the Fifth Circuit rejected the view of the district judge that the old, and illogical, state court decision would not be followed by a contemporary Georgia court and, in effect, ruled that a contract between Dun & Bradstreet and its customer was void if any information later supplied by Dun & Bradstreet pursuant to such contract were erroneous, no matter how innocent the error.

The effect of this rule is a denial of equal protection to Dun & Bradstreet. The contract of Dun & Bradstreet (as are all such contracts) is for the reporting of accurate information, and not for the reporting of inaccurate information. The interpretation placed upon such contracts by the Fifth Circuit results in classifying such contracts unlike contracts of anyone else, so that only information reporting businesses, unlike all other persons, are denied the protection of the Georgia statute which according to its terms would apply to all alike in the conditional privilege it establishes.

The arbitrary effect of this decision is to, in effect, recognize the existence of the privilege only insofar as publications of Dun & Bradstreet are accurate, and takes the privilege away at the only time it would be applicable, that is, when an inaccurate report is made, inadvertently and without malice.

To reach this result of denying the application of the statutory conditional privilege to the publication in question, the Fifth Circuit has, in effect, held that any error in a statement by a business information agency, no matter how minor (i.e., a missed initial, a wrong address, or, as in this case, mistaken identity respecting two minor civil suits?), if libellous, is "immoral", thus constituting an illegal act, and thus voiding, in some manner, the underlying contract pursuant to which the report is made.[5]

This decision has the further effect, in arbitrary and illogical fashion, of voiding contracts of petitioner with its subscribers in a manner which substantially, if not completely, impairs its ability, freedom, and right to enter into valid contracts to provide information, since any such contract under the decision of the Fifth Circuit would be subject to later "voiding" in the event of an inadvertent error in a report made pursuant thereto.

Further, the principles sought out and enunciated by the Fifth Circuit as reasons for its decision are not limited to such contracts in Georgia alone, but instead are of broadest possible scope attacking what the Fifth Circuit characterizes as "[t]he fundamental reason for

[5] For the arbitrariness of this result, compare *Cochran v. Sears, Roebuck & Co.*, 72 Ga. App. 458, 34 SE.2d 296 (1945), where the privilege was held applicable with respect to an erroneous statement that a person had syphilis, where the statement was made pursuant to a private contractual duty. See 335 F.Supp. at 180 (A-18). No reporting agency was involved.

allowing credit reporting agencies to claim the conditional privilege . . ." 486 F.2d at 31 (A-26).

The Fifth Circuit in a breath-taking sweep, has, for tenuous reasons of "empirical analysis" and "contemporary notions of consumer protection", appearing nowhere in the record, undermined the established law of the "great majority of jurisdictions", 486 F.2d at 32 (A-34), all of which have considered the question since 1886.

Strangely, the Fifth Circuit in its opinion refers to the Fair Credit Reporting Act which provides for reporting agencies substantially the conditional privilege which the Court denied in the instant litigation (see 15 U.S.C. §1681h(e)), and the decision of the Court, in undertaking to give effect to what the Court considers to be "contemporary notions of consumer protection", totally ignores the most recent expressions of such notions as set out in the preamble of this Act which provides in part as follows:

> "(1) the banking system is dependent upon fair and accurate reporting . . .
>
> (2) consumer reporting agencies have assumed a vital role in establishing and evaluating consumer credit and other information on consumers." 15 U.S.C. §1681a(1).

This, even though business reports as such are not subject to the Act, cannot be considered less than significant with reference to consumer protection in the field of consumer credit.

In addition to following the established law of the great majority of jurisdictions, the district court recognized the "strong public interest in the availability of credit information," 335 F. Supp. 170, 180. See *Serino v. Dun & Bradstreet, Inc.*, 267 F. Supp. 396 (D.C. S.C.

1967); *Seaboard Warehouse Terminals, Inc. v. Dun & Bradstreet, Inc.*, 328 F. Supp. 291 (D.C. Fla. 1971). The need of services such as those provided by business information reporting agencies is obvious; for how else does the business man in Georgia, large or small, obtain credit from or have sufficient information to grant credit to businesses not known to him and who do not know him, and which are located at great distances from him. Indeed, it is the small business which is much more reliant upon such services since small businesses are much less likely to be known to businesses far away, or to have resources permitting them to know about such distant businesses.

There can be no question that business information reporting is a lawful occupation. The result of the decision of the Fifth Circuit limits the ability and right of petitioner to pursue this lawful occupation, such constituting a denial to petitioner of due process of law.

Further, the Fifth Circuit has expanded the commercial speech doctrine of *Valentine v. Chrestensen*, 316 U.S. 52 (1942) to include publication of information pur- 52, 62 S.Ct. 52 (1942) to include publication of information pursuant to subscription unless the publication expresses "social concerns and grievances". This application of the commercial speech doctrine by the Fifth Circuit is a significant expansion of that doctrine in that, for the first time, that doctrine has been applied to a publication that was not either 1) a commercial solicitation or commercial proposal (see *Valentine v. Chrestensen*, supra), or 2) a proposal of possible employment (see *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553 (1973). The publication involved in the present case was not a commercial proposal or solicitation or a proposal for

employment, but was instead no more than the communication of factual information by Dun & Bradstreet to its subscribers.

The Fifth Circuit reversed the decision of the District Court for the Northern District of Georgia. Though the Fifth Circuit found that "the district court's reasoning is not totally without merit" (and, indeed was in accord with the great majority of the jurisdictions in the United States), it reversed the decision of the district judge and substituted in place thereof its own view of what the law of Georgia should be, based upon what it perceived as "controlling reasons"—that is "empirical analysis" and "contemporary notions of consumer protection", not contained in the record—that the publication of business information by Dun & Bradstreet, pursuant to its contracts with its subscribers, should not qualify for a conditional privilege as afforded by the Georgia statute. Using these reasons, the Fifth Circuit, in one sweep of the pen, undermined the principles of law, legislative and judicial, established in the great majority of jurisdictions during the course of the twentieth century.

Under the standard of at least five other circuits, when the law of the state in which the district judge sits in unsettled, or the state courts have not recently considered the question in issue, the interpretation given state law by the district judge will not be reversed unless it is clearly wrong; the decision of the district court will be upheld if the district court reached a permissible conclusion. See *Wells v. Colorado College*, 478 F.2d 158 (10th Cir. 1973) (clearly erroneous); *Hurst v. Dare To Be Great, Inc.*, 474 F.2d 483 (9th Cir. 1973) (clearly wrong); *Harris v. Hercules, Inc.*, 455 F.2d 267 (8th Cir. 1972) (clearly erroneous); *Lomartira v. American Automobile Insurance Co.*, 371 F.2d 550

(2d Cir. 1967) (clearly wrong); *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12 (6th Cir.) cert. denied, 382 U.S. 980 (1965) (upheld if permissible conclusion).

The decision of the district judge here was clearly a permissible conclusion and, indeed, was in accord with the "great majority of jurisdictions" as recognized by the Fifth Circuit. Therefore, the decision by the Fifth Circuit in this case demonstrates a split of authority among the circuits as to the weight to be given to the determination of state law by a district judge sitting in the state whose law is in question in a diversity case.

We respectfully submit that the foregoing amply shows reasons for issuance for a writ of certiorari as set out in Rule 19 of this Court, in that 1) the effect of the opinion of the Fifth Circuit is to decide a federal question in a way which conflicts with applicable decisions of this Court; and 2) the decision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court; and 3) the decision demonstrates a split of authority among the circuits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the required number of copies of the foregoing Petition for Writ of Certiorari upon Messrs. Rex T. Reeves and Merrill Collier, Reeves & Collier, 411 Candler Building, 127 Peachtree Street, N. E., Atlanta, Georgia 30303, Attorney for Respondent, David Pope Hood, by depositing the same in the United States Mail, first-class postage prepaid, properly addressed to them.

This _____ day of January, 1974.

_____

Attorney for Petitioner,
DUN & BRADSTREET, INC.